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In the Supreme Court of the United States

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN, PETITIONER

v.

MARK OWEN MCGUIRE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the introduction of medical evidence of a child's prior injuries in a child abuse case violates due process in the absence of direct evidence that the defendant inflicted the prior injuries.

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INTEREST OF THE UNITED STATES

This case presents issues concerning the scope of federal habeas corpus, the extent to which proof of past injuries to a child can constitutionally be admitted in a case involving child abuse, and, more generally, the extent to which evidentiary rulings are subject to constitutional scrutiny under the Due Process Clause. The United States has a substantial interest in all three issues. First, the proper administration of habeas corpus has been the subject of sustained congressional and Executive Branch attention. Second, the issue of the admissibility of evidence of prior injuries arises frequently in child abuse cases that the United States prosecutes because of its law

enforcement responsibilities in connection with the District of Columbia, federal reservations, and the military. Finally, because of its involvement in litigation and its concern with the continuing development of enlightened rules of evidence, the United States has an interest in ensuring that the Due Process Clause is not applied to impose on the States and the federal government an inflexible code of evidence as a matter of constitutional compulsion.

STATEMENT

1. On the evening of July 7, 1981, respondent and his wife, Daisy McGuire, brought their six-month-old daughter, Tori, to a hospital in Hayward, California. The baby was bluish and not breathing. The screening nurse immediately rushed Tori to an emergency treatment room to receive medical treatment and then returned to obtain a medical history. Respondent told the nurse that Tori had had a cold recently and had hit her head that morning when she had fallen from a couch. Pet. App. A28, A61, A62.

As she attempted to treat Tori, the attending physician noticed a large and relatively recent bruise on the infant's chest with multiple bruises around it. She also noticed black and blue marks on Tori's ears, and scar tissue indicating tearing around her rectum. Pet. App. A28.

Efforts to revive the baby were unsuccessful. She died 45 minutes after being brought to the hospital. Pet. App. A28.

Questioned by police that night and the following day, respondent said he believed the baby had fallen off the couch and struck her walker. He said that Daisy went out to make a phone call and that he went upstairs, leaving the baby lying on the couch. He said he heard the baby cry, and when he came back

downstairs, he found the baby lying on the floor. When an officer expressed skepticism that the child's injuries could have resulted from a fall off the couch, respondent replied, "Maybe some Mexicans came through the door" while he was upstairs. Pet. App. A4, A29-A30, A63; Tr. 209. Questioned separately by police officers, Daisy McGuire stated that she had not hit the baby and that she did not know whether her husband had done so. Pet. App. A29.

An autopsy was subsequently performed. It revealed 17 contusions on the baby's chest, 29 contusions in her abdominal area, a split liver, a split and lacerated pancreas, a lacerated large intestine, and a damaged lung and heart vein. The autopsy also revealed evidence of rectal tearing, which was at least six weeks old, and evidence of partially healed rib fractures, which were approximately seven weeks old. Pet. App. A28-A29, A62-A63.

2. Respondent was charged with second degree murder. At trial, the attending physician testified about the bruises on Tori's chest and ears and the scar tissue on her rectum. Another doctor testified about the autopsy results, including the evidence of rectal tearing and partially healed rib fractures. Both physicians testified that the injuries, including the prior rib and rectal injuries, were indicative of what they referred to as "battered child" syndrome. Pet. App. A28-A29, A31, A63.

In addition to introducing the medical evidence and the statements respondent had made to the police, the State called a witness who overheard a conversation between respondent and his wife in the hospital emergency room. According to the witness, Daisy repeatedly asked respondent "what really happened." Respondent replied that he "guessed" the baby fell

off the couch. Daisy continued to press for an answer. At one point she said, "I am very patient. I can wait a long time. I want to know what really happened." Tr. 178. Finally, Daisy told respondent that "the baby was alright when I left. You are responsible." Tr. 179.

A neighbor of respondent's testified that she had seen respondent physically abuse Daisy and that she had seen respondent pick up Tori by one of her arms and roughly pinch the infant's cheeks together. She further testified that she had never seen Daisy abuse the child in any way. The neighbor added that Daisy had told her she was afraid to leave Tori with respondent because he had been rough with the baby and "did bad things" to her. Tr. 462-472, 488-489.

Daisy McGuire testified at trial under a grant of transactional immunity. In contrast to her prior statement to the police, she testified at trial that she had beaten the child on the day of the injuries before her husband came home. Pet. App. A4-A5, A63.

On March 19, 1982, the jury convicted respondent of second degree murder. Pet. App. A5.

3. In January 1985, the California Court of Appeal affirmed respondent's conviction. Pet. App. A61-A71. As one of his arguments, respondent maintained that "[t]he trial court erred in admitting evidence of prior injuries which were in no way tied to [him]." *Id.* at A64. The Court of Appeal responded that the evidence had been introduced to establish "battered child syndrome," and it explained the nature and purpose of evidence of "battered child syndrome" under California law:

> [T]his syndrome means that a child has received repeated and/or serious injuries by non-accidental means. * * * [T]he criteria for the 'battered child syndrome' * * * are (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect * * *.
>
> A finding . . . of the 'battered child syndrome' * * * simply indicates that a child found with the injuries outlined above has not suffered those injuries by accidental means.

Id. at A65-A66 (internal quotation marks omitted). The court then concluded that, under state law, the introduction of the medical evidence of the infant's prior injuries to establish "battered child syndrome" was "patently proper." *Id.* at A66.

Respondent sought further review from the California Supreme Court. In March 1985, that court denied the request to review respondent's conviction. Pet. App. A5.

4. Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. In July 1987, the district court denied the petition. Pet. App. A27-A42. Among other issues, the court rejected respondent's contentions that the admission of the evidence of prior injuries—the rib fractures and rectal tearing—was impermissible, and the trial court's instruction on the use of prior act evidence was improper. *Id.* at A31-A36.

With respect to the evidence of the prior injuries, the court found that the use of that evidence to establish "battered child syndrome" was proper under California law and that the introduction of that evidence did not violate the Due Process Clause. Pet.

App. A31-A32. The court rejected respondent's claims that "the prior act evidence was irrelevant, because no defense of accident was ever presented, and cumulative, because testimony of doctors at trial already established that death was not the result of accident without resort to prior act evidence." *Id.* at A32. The court held that the evidence was relevant to the State's case-in-chief to show that Tori's death was the result of criminal conduct and to rebut respondent's prior statement that the baby may have died as the result of a fall from a couch. *Ibid.* Moreover, the court noted, "even if admission of prior act evidence was irrelevant and/or cumulative, [respondent] has not shown that it was so prejudicial as to amount to a denial of fundamental fairness." *Ibid.*

With respect to the jury instruction, respondent claimed that one portion of the instruction "improperly allowed the jury to base its verdict on acts for which [respondent] was not on trial and to which he was not connected, instead of limiting the use of the prior act evidence to show absence of accident." Pet. App. A34.[1] The court found that it was a close question whether Part 3 of the instruction violated the California Evidence Code on the use of prior act evidence. But the court found it unnecessary to reach that issue, because respondent had not demonstrated that "any possible error rendered his trial so fundamentally unfair that he was denied due process." Pet. App. A35. The court emphasized that "there was substantial evidence, however circumstantial, to support the jury's finding that the baby's death was the result of a murder and that petitioner was responsible." *Id.* at A36.

5. The court of appeals reversed and granted habeas corpus relief because it concluded that the evidence of Tori's prior injuries had been improperly introduced and that the jury instruction had exacerbated the error. The court held that "the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered [respondent's] trial arbitrary and fundamentally unfair." Pet. App. A8-A9.

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[1] The court instructed the jury:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you[,] to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant.
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case.
>
> You are not permitted to consider evidence for any other purpose.

Tr. 756-757. (Both the district court and the court of appeals omitted the word "clear" from Part 3 of the instruction quoted above. Pet. App. A12-A13, A33-A34). Respondent claimed that the reference to "the other two offenses" in Part 3 was a reference to his rough treatment of his wife and baby, but the district court held that, in context, it was a reference to "the two prior injuries to the baby" (the fractured ribs and rectal tearing). *Id.* at A34 n.1.

With regard to the introduction of the evidence, the court first concluded that the "extensive evidence of prior physical abuse the baby had suffered * * * has no relevance to [respondent] because the prosecution did not establish that [respondent] inflicted those injuries." Pet. App. A9. Emphasizing that "[e]vidence cannot have probative value unless a party connects it to the defendant in some meaningful way," the court found that "the prosecution made no such connection" to respondent, and that "acts which the prosecution did not connect to [respondent] cannot be characterized as *his* prior acts." *Id.* at A9-A10. The court then proceeded to find the introduction of the evidence prejudicial. The court of appeals concluded that the evidence was admitted erroneously, as a matter of state law, because no claim had been made at trial that the baby died accidentally. *Id.* at A11. The court thus found that the evidence of prior injuries had been introduced "to establish that [respondent] was a child abuser, and for no other purpose." *Id.* at A10-A11.

With regard to the jury instruction, the court found that "[t]he trial court did not merely admit irrelevant, highly prejudicial evidence without comment. The trial court *instructed* the jury to use that evidence in the most improper way possible." Pet. App. A12. In the court's view, the instruction impermissibly permitted the jury "to make a direct determination of guilt by concluding that [respondent] committed prior bad acts." *Id.* at A13.[2] The court concluded that this instruction, "considered along with the admittance of the prejudicial evidence," in-

[2] The court also observed that the trial court's instruction "appears" to have been "an incorrect reading" of California's standard jury instructions. Pet. App. A13 n.2.

fected the entire trial, and that the combined error was not harmless because, "[a]lthough there was evidence suggesting [respondent's] guilt, this evidence was certainly not overwhelming." *Id.* at A12-A14 & n.2.[3]

6. Judge Kozinski, in an opinion joined by Judge Trott, dissented from the denial of rehearing en banc. The dissent made four points: (1) the panel improperly second-guessed the state courts on questions of state law; (2) the evidence of prior injuries was relevant to establish intent and to foreclose a conclusion that the death was accidental; (3) the panel's harmless error analysis was flawed; and (4) the panel's decision might preclude a retrial because it included comments about the lack of proof, which might be taken as a finding that the evidence at trial was insufficient to support the verdict. Pet. App. A43-A60.

SUMMARY OF ARGUMENT

In reaching its conclusion that respondent was entitled to habeas corpus relief, the court of appeals committed a series of related errors that reflect a misapprehension of a federal court's authority to review state court evidentiary rulings that are challenged under the Due Process Clause.

First, the court of appeals was incorrect in holding that due process prohibits the introduction, in a child abuse case, of medical evidence of the child's prior injuries unless there is evidence showing that the de-

[3] The opinion on which the final judgment was based was the court of appeals' second opinion in this case. The panel issued an initial opinion on May 8, 1989 (Pet. App. A16-A26), reaching the same result. It withdrew that opinion on April 23, 1990, and filed its second opinion on May 4, 1990. *Id.* at A1.

fendant caused the injuries. It has long been recognized that anonymous similar act evidence may be highly probative on material issues such as whether a particular injury was part of a pattern that suggests a non-accidental cause. There is a particularly sound basis for admitting evidence of a pattern of prior injuries suffered by a young child, because medical evidence of such injuries is an important element of the accepted medical diagnosis of "battered child syndrome," which justifies the conclusion that the child did not receive her injuries accidentally.

Second, to the extent that a connection to the defendant is necessary, it may be proved by circumstantial evidence. Here, there was abundant circumstantial evidence of such a connection, including testimony that respondent and his wife were the caretakers of the infant and that respondent, but not his wife, had been seen treating the baby roughly.

Third, the court of appeals improperly rejected the state court's interpretation of California law and based its decision to grant habeas corpus relief at least in part on its own interpretation of the State's rules of evidence. Federal habeas corpus jurisdiction provides no warrant for a federal court to review the application of state rules of evidence and to grant a writ of habeas corpus if it finds that the state courts committed a violation of state law.

Fourth, the court of appeals mistakenly suggested that, at least in this context, a defendant's failure to put a particular element in issue precludes the government from introducing evidence on that issue. Because the burden of proof rests on the government to prove every element of the offense, regardless of whether the defendant offers evidence or argument on each element, it is unrealistic to say that when a

defendant fails to challenge the sufficiency of the prosecution's evidence on a particular element, that element has not been "put in issue." For that reason, the government should not, as a matter of constitutional command, be precluded from introducing evidence relating to a particular element simply because a defendant does not affirmatively contest that element during the trial. In any event, in this case it was clear from all the evidence at trial that respondent effectively put both the question of accident and the question of intent into issue. The principal theory of his defense was that Tori died as the result of mistreatment by Daisy McGuire and that respondent did not harm the child. But the jury obviously could have rejected Daisy McGuire's testimony as a fabrication intended to protect respondent. In that event, the jury would have to decide whether the child died as a result of an accident or as a result of an intentional assault. The challenged evidence was highly pertinent to the latter issue.

Finally, the court of appeals was wrong in holding that the trial court's instruction to the jury regarding the prior injury evidence justified granting the writ of habeas corpus. Viewed in the context of the other instructions and the trial as a whole, the instruction simply permitted the jury to take account of Tori's prior injuries, in connection with the evidence of respondent's past mistreatment of the child, in determining whether respondent was responsible for inflicting the injuries that led to her death. That use of the evidence was entirely proper and did not deny respondent a fair trial.

ARGUMENT

RESPONDENT WAS NOT DENIED DUE PROCESS AS A RESULT OF THE INTRODUCTION OF EVIDENCE OF HIS CHILD'S PRIOR INJURIES

A. The Introduction Of Medical Evidence Of A Child's Prior Injuries In A Child Abuse Case Does Not Require Evidence That The Defendant Inflicted The Injuries

Federal courts "do not sit to review state court actions on the propriety of [a] trial judge's actions in the admissibility of evidence." *Lisenba* v. *California*, 314 U.S. 219, 228 (1941). This Court has repeatedly stated that "[b]eyond the specific guarantees in the Bill of Rights, the Due Process Clause has limited operation." *Dowling* v. *United States*, 110 S. Ct. 668, 674 (1990). Thus, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983). See *Burgett* v. *Texas*, 389 U.S. 109, 113-114 (1967) ("We do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution."); *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967) ("[I]t has never been thought that [prior] cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority.").

In the absence of a claim that evidence violates a specific constitutional guarantee (such as the Confrontation Clause, see, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. 56 (1980)), a particular evidentiary ruling violates

the Constitution only if it "so infuse[s] the trial with unfairness as to deny due process of law." *Lisenba*, 314 U.S. at 228. See *Buchalter* v. *New York*, 319 U.S. 427, 429-430 (1943) (Due Process Clause addresses "fundamental principles of liberty and justice" and otherwise "leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate"; it "does not permit a party to bring to the test of a decision in this court every ruling made in the course of a trial in a state court"); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934) ("The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. * * * Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."). Far from infusing the trial with unfairness, the introduction of medical evidence of a child's prior injuries, even without evidence that the defendant inflicted the injuries, is often highly relevant and is widely regarded as admissible for that reason.

It has long been recognized that similar act evidence may have probative value even if it is not shown that the defendant committed the similar acts. As one leading commentator has observed, "in principle, anonymous acts can be admitted either to prove the actus reus (the commission of a criminal or tortious act by someone) or to negative innocent intent." E. Imwinkelried, *Uncharged Misconduct Evidence* § 2:05, at 8 (1984). He explains:

> The probative value of the acts for these purposes rests on the doctrine of chances. For instance, as a matter of common human experience, it is objectively improbable that several accidental fires will occur at buildings owned by the same person within a short period of time. In an arson prosecution or an insurance case in which the insurer defends on the ground of the insured's arson, evidence of other fires is relevant to prove the incendiary origin of the fire giving rise to the suit. The evidence has a tendency in reason to increase the possibility of human intervention and to disprove natural causation. The other fires are admissible to prove the actus reus of arson even if the proponent of the evidence cannot link the defendant to the fires.

Ibid. (footnotes omitted). See also *Lisenba*, 314 U.S. at 227-228; *State* v. *Lapage*, 57 N.H. 245, 294 (1876); 2 J. Wigmore, *Wigmore on Evidence* §§ 302, 303, 363 (Chadbourn rev. 1979). Thus, the court of appeals' suggestion that evidence of prior injuries has "no relevance" without proof that the defendant inflicted the injuries (Pet. App. A9) is incorrect.[4]

The admissibility of evidence of prior injury is especially justified in a child abuse case, because the evidence of prior injuries is an aspect of the medical diagnosis of "battered child syndrome," a diagnosis developed in the early 1960's,[5] and accepted as evi-

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[4] States may, of course, take different views of the relevance of anonymous act evidence. See, *e.g.*, E. Imwinkelreid, *supra*, at § 2:05 (discussing different approaches). The discussion above is not to suggest that only one view of such evidence is appropriate; rather, it is to suggest that a view that such evidence is probative is not arbitrary or bizarre, and thus does not violate fundamental fairness.

[5] See McCoid, *The Battered Child and Other Assaults Upon The Family: Part One*, 50 Minn. L. Rev. 1 (1965); Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered-Child Syndrome*, 181 J.A.M.A. 17 (1962).

dence of child abuse in a number of jurisdictions.[6] When offered to show that a child's injuries are the product of child abuse, rather than accident, evidence of prior injuries is relevant without regard to the identity of the person who inflicted those injuries.[7] Such evidence is especially important in child abuse

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[6] See, *e.g.*, *State* v. *Moyer*, 151 Ariz. 253, 727 P.2d 31 (Ct. App. 1986); *People* v. *Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); *State* v. *Dumlao*, 3 Conn. App. 607, 609-610, 491 A.2d 404, 409 (App. Ct. 1985); *People* v. *DeJesus*, 71 Ill. App. 3d 235, 389 N.E.2d 260 (1979); *Commonwealth* v. *Labbe*, 6 Mass. App. 73, 373 N.E.2d 227 (App. Ct. 1978); *State* v. *Goblirsch*, 309 Minn. 401, 246 N.W.2d 12 (1976); *Bludsworth* v. *State*, 98 Nev. 289, 646 P.2d 558 (1982); *People* v. *Henson*, 33 N.Y.2d 63, 349, N.Y.S.2d 657, 304 N.E.2d 358 (1973); *State* v. *Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978); *Ashford* v. *State*, 603 P.2d 1162 (Okla. Crim. App. 1979); *Commonwealth* v. *Rogers*, 364 Pa. Super. 477, 528 A.2d 610 (1987); *State* v. *Best*, 89 S.D. 227, 232 N.W.2d 447 (1975); *State* v. *Tanner*, 675 P.2d 539 (Utah 1983). See also *United States* v. *Bowers*, 660 F.2d 527 (5th Cir. 1981).

[7] See, *e.g.*, *Bludsworth* v. *State*, 98 Nev. at 291-292, 646 P.2d at 559 ("Appellants also erroneously argue that the bite mark evidence and evidence of other bruises were incompetent because there was no prior establishment, by clear and convincing evidence, that either [defendant] was responsible for each of the prior injuries. Admissibility of the bite mark and other bruise evidence does not depend on connecting either defendant to the infliction of the injury. It is independent, relevant circumstantial evidence tending to show that the child was intentionally, rather than accidentally injured on the day in question. Proof that a child has experienced injuries in many purported accidents is evidence that the most recent evidence may not have resulted from yet another accident.") (footnote omitted). See also Myers, *Uncharged Misconduct in Child Abuse Litigation*, 1988 Utah L. Rev. 479, 518-519.

cases because proof of such crimes, which frequently occur without third-party eyewitnesses and in a context of victim helplessness, is notoriously difficult.[8]

Evidence of a child's prior injuries may therefore provide support for a medical diagnosis indicating the cause of the victim's death. For that reason, the evidence of injuries, as an element of that diagnosis, should be viewed primarily as medical evidence regarding the victim's condition, rather than as so-called "character evidence" pertaining to the defendant. As one pair of commentators has observed:

> "[B]attered child syndrome" is a *medical diagnosis* based on expert observation of a child's damaged body. The diagnosis does not depend on evidence of defendant's conduct toward the child. Nor does it hinge on proof of defendant's character or propensity to abuse children. In other words, testimony on the battered child syndrome is *not* character evidence. Thus, testimony on the battered child syndrome is not barred by the rule prohibiting evidence of a person's character to prove that the person acted in conformity therewith on a particular occasion.

Myers & Carter, *Proof of Physical Child Abuse*, 53 Mo. L. Rev. 189, 193 (1988) (footnote omitted).

The court of appeals' ruling creates a curious anomaly that illustrates the flaw in the court's analysis. Under the court of appeals' ruling, the attending physician's testimony regarding the bruises on Tori's chest and ears was admissible to show the

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[8] See, *e.g.*, Myers, *supra*, 1988 Utah L. Rev. at 479 ("Child abuse is maddeningly difficult to prove."). See also *State* v. *Tanner*, 675 P.2d at 541 ("The key evidence in this case is the mute testimony of the body of three-year-old Tawnya Tanner.").

cause of death. But when the physician also testified about the evidence of rectal tearing that she discerned, and about the evidence of rib injuries from the autopsy results, she crossed into the zone of irrelevance and prejudice (and constitutional prohibition). Similarly, the pathologist's testimony regarding the autopsy evidence of 46 contusions on the infant's body and massive injuries to her liver, pancreas, intestine, lung, and heart was relevant and admissible. But when he testified about the autopsy evidence of rib and rectal injuries, he, too, crossed into the zone of the impermissible.

The distinction between the two types of evidence does not hold up. The evidence of the recent injuries was admissible because it tended to show that the infant had died as the result of a number of separate wounds. That was an important fact in the case, because it tended to show that the infant's death could not have been the product of an accident, such as a fall from a couch. The evidence that the infant had suffered a whole series of wounds made it virtually certain that the injuries were intentionally inflicted. That is a powerful basis for admitting the evidence. Yet it is for precisely that reason that the evidence of Tori's prior injuries was admissible: they tended to show that the infant had suffered abuse over a long period of time and that the infant's injuries were therefore not likely to have been the result of an accident suffered on the day of her death. Instead, they were part of a pattern—indeed, a medically recognized pattern—that speaks powerfully to the cause of death.

To be sure, one federal child abuse decision, in the course of analyzing child abuse evidence under Fed. R. Evid. 404(b), has held that evidence of prior injuries to a child should not have been introduced be-

cause there was no proof that the defendant inflicted the prior injuries. See *United States* v. *Brown*, 608 F.2d 551 (5th Cir. 1979). See also *United States* v. *Colvin*, 614 F.2d 44, 45 (5th Cir.) (distinguishing *Brown* because there was sufficient evidence to conclude that the defendant inflicted the prior injuries), cert. denied, 446 U.S. 945 (1980); *United States* v. *Harris*, 661 F.2d 138, 143 (10th Cir. 1981) (same). Obviously, evidence connecting the defendant to prior injuries inflicted on the victim or others adds to the probative value of the "other injury" evidence. But that is not to say that that evidence is irrelevant in the absence of proof that the defendant caused those other injuries. To the extent the *Brown* decision suggests that proof of prior injuries suffered by a child is not probative of the cause of death or subsequent injuries, we believe it was wrongly decided.

The *Brown* court fell into error, we submit, by characterizing the proffered evidence as a form of "similar act" evidence offered to show that a defendant who acted in a particular manner in the past may have acted that way in connection with the events at issue in the trial. The "similar act" evidence in the *Brown* case failed the test of relevance, the court concluded, because the evidence of prior misconduct was not sufficiently tied to the defendant. It is, of course, often the case that "similar act" evidence is not relevant if the jury cannot reasonably conclude both "that the act occurred and that the defendant was the actor." *Huddleston* v. *United States*, 485 U.S. 681, 689 (1988). For example, evidence in a bank robbery prosecution that a number of highly similar bank robberies were committed in the same period of time is irrelevant unless there is some basis to believe that the defendant was involved in

the uncharged robberies. But that does not mean that all evidence of similar events in the past is admissible only if the prior events can be tied to the defendant. The prior events may be relevant for purposes quite independent of the direct inference that the person who committed those acts is likely to have committed the ones charged in the indictment. The requirement of some independent basis for relevance is satisfied in this case, because medical evidence of battered child syndrome is highly probative in showing that death was not caused by accident, but by the intentional act of someone with access to the victim. Particularly where, as here, the number of persons with access to the victim is very small, evidence that the homicide was intentional is a very important part of the State's case.

B. To The Extent That A Connection Between The Defendant And The Prior Injuries Is Necessary, Circumstantial Evidence Can Provide That Connection

If, contrary to our submission, the Constitution requires that the government show a connection between the defendant and the victim's prior injuries before evidence of those injuries may be admitted, even in a case involving battered child syndrome, that connection was provided by the circumstantial evidence in this case. Circumstantial evidence is, of course, fully admissible, and it may support a conviction even if it is unaccompanied by any direct evidence.[9]

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[9] See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121, 140 (1954). See also *United States* v. *Corpus*, 882 F.2d 546, 550 (1st Cir. 1989); *United States* v. *Rodriguez*, 812 F.2d 414, 416 (8th Cir. 1987); *United States* v. *Maggitt*, 784 F.2d 590, 593 (5th Cir. 1986).

In holding that the evidence in this case did not support a connection between respondent and Tori's prior injuries, the court of appeals ignored strong circumstantial evidence pointing to respondent as the party responsible for those injuries. Respondent and Daisy had custody of Tori for the entire six months of her life. Pet. App. A63. There was evidence at trial indicating that respondent had been rough with the child. *Id.* at A63-A64. In addition, a neighbor testified that Daisy had said she feared leaving the baby with respondent, because he "did bad things" to the child. *Id.* at A10; Tr. 470. At the time of the infant's death, moreover, respondent gave the police two highly implausible explanations for her injuries (the fall from the couch and the possible intercession of "some Mexicans"). Pet. App. A29-A30. In addition, respondent's hospital conversation with Daisy strongly supports the conclusion that he, and not Daisy, inflicted the injuries on Tori. *Id.* at A55-A56, A63.

From all of that evidence, the jury could conclude (1) that the only two people with sufficient access to the child to administer repeated physical abuse were respondent and his wife; and (2) that respondent was far more likely than his wife to have been the person who abused the child. Although some of the circumstantial evidence cited above related to the incident that led to Tori's death, the jury could properly use that evidence to assist it in determining whether respondent was also involved in the prior acts of abuse. See *Huddleston*, 485 U.S. at 691. Thus, even if the court of appeals were correct that due process requires a connection between the defendant and the medical evidence of prior injuries, the court of appeals' conclusion that there was no such connection here was incorrect.

C. The Purported Misapplication Of State Law Does Not Establish A Due Process Violation

The court of appeals emphasized that, in its view and despite the ruling of the California Court of Appeal to the contrary, the admission of the medical evidence of prior injuries violated state law because respondent had not explicitly raised accident as a defense. Pet. App. A11. To the extent that the court granted habeas relief because of this perceived misapplication of state law, it was in error "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984). See also *Lewis* v. *Jeffers*, 110 S. Ct. 3092, 3102 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."); *Rose* v. *Hodges*, 423 U.S. 19, 22 (1975) ("It was not the province of a federal habeas court to re-examine these [state law] questions.").[10]

The habeas corpus jurisdicition of federal courts is defined by statute. Federal habeas corpus relief is

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[10] Many court of appeals decisions have recognized this settled principle. See, *e.g.*, *Llamas-Almaguer* v. *Wainwright*, 666 F.2d 191, 193 (5th Cir. 1982) ("[I]t is elementary that questions of state law cannot be raised on federal habeas."); *Carrizales* v. *Wainwright*, 699 F.2d 1053, 1055 (11th Cir. 1983) ("A state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved."); *Passman* v. *Blackburn*, 652 F.2d 559, 567 (5th Cir. 1981) ("This court does not sit as a super state supreme court to review errors under state law * * *."); *United States ex rel. Burnett* v. *Illinois*, 619 F.2d 668, 671 (7th Cir. 1980) ("Errors in the interpretation of state authority are for the state supreme court to correct. This court will not take the extraordinarily intrusive action of setting aside a criminal conviction in the guise of due process review, simply because we disagree with the state court's interpretation of state law.").

available for a person who "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). The federal habeas corpus statute gives federal courts no authority to grant relief based on a violation of state law. A federal court therefore exceeds its jurisdiction under the statute if it bases its judgment on a perceived violation of state law that is not also a violation of the law of the United States.

D. The Purported Absence Of An Accident Defense In This Case Does Not Render the Admission of Evidence of Prior Injuries a Violation of the Due Process Clause

Perhaps the most indefensible feature of the court of appeals' decision is its holding that the absence of a defense of accident in this case rendered the admission of the prior injury evidence a violation of due process.

The State in a criminal case must prove all the elements of the offense beyond a reasonable doubt. Moreover, "[a] simple plea of not guilty * * * puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988). A defendant's tactical decision about what issues to focus on at trial and what issues to ignore should not have the effect of disabling the government from presenting evidence on every point that the government is required to prove. Put another way, it does not violate due process for the government to prove its case.

In this case, the State was required to prove all the elements of second degree murder in order to obtain a conviction. To do so, the State had to prove that respondent's acts resulted in Tori's death and that respondent intended to kill Tori. The evidence that Tori suffered from battered child syndrome,

which was established in part by proof of her prior injuries, tended to show that someone intended to injure her, which was probative of both causation and intent.

By eliminating the possibility of accident, the State made it clear to the jury that the death was a homicide and effectively narrowed to two the number of persons who could have committed the offense. To exclude evidence showing the absence of accident simply because respondent did not principally rely on the "defense" of accident would therefore deny the State a highly probative piece of evidence going to both of the critical issues in its case.

Even if respondent had agreed to stipulate that the killing was not accidental, the State would not have been required to accept that stipulation in lieu of evidence that would make the point more forcefully for the jury. See *United States* v. *Ellison*, 793 F.2d 942, 949 (8th Cir. 1986) ("Generally, the government is not bound by a defendant's offer to stipulate to an element of a crime. * * * The rationale for the rule is to enable the government to present to the jury a complete picture of the events constituting the crime charged. 'To substitute for such a picture a naked admission might . . . rob the evidence of much of its fair and legitimate weight.' "). It follows, *a fortiori*, that in the absence of an offer to stipulate, the State should not suffer the exclusion of highly relevant evidence simply because respondent did not indicate an intention to contest that evidence directly.

As the judges who dissented from denial of rehearing en banc in this case pointed out, a holding that the State may not introduce evidence on an element uncontested by a defendant would sow confusion, because the government and the court (and perhaps

even the defendant) may not know until well into trial what issues will be contested. Pet. App. A50-A52. See, *e.g.*, *Brooks* v. *Tennessee*, 406 U.S. 605, 609-610 (1972) (emphasizing that the defense strategy may evolve as the case progresses). In fact, a defendant may not reveal his theory of defense until closing argument, when he attacks some perceived insufficiency or inconsistency in the government's case. It would therefore be unworkable to limit the government's proof based on what appears to be the theory of defense at the outset of the trial, when the defense theory may shift during the trial and may be quite eclectic by the end.

Even if it were necessary, as a constitutional matter, for there to be a specific predicate for the introduction of evidence of battered child syndrome, the issue of accident was sufficiently presented in this case that the prior injury evidence was needed to answer it. Respondent initially claimed, both to the police and to his wife, that Tori had fallen off the couch. Pet. App. A4, A29, 363. Although Daisy McGuire testified that it was she who had struck the child, respondent did not rely entirely on the theory that Daisy had committed the murder. Rather, throughout the case and even in closing argument, respondent's counsel maintained that either Daisy committed the homicide or there was no homicide at all in this case. See Tr. 689-690 ("The Prosecution has failed * * * to prove beyond a reasonable doubt that there was a murder and has failed to prove beyond a reasonable doubt that [respondent] had any[] criminal responsibility for the death of his daughter."). Counsel ultimately argued that Daisy had hit the baby, but that the baby had suffered additional injuries when she accidentally fell off the couch.

Tr. 713. In light of respondent's partial reliance on the "accident" evidence, it was particularly appropriate for the State to rebut that evidence by showing that Tori's injuries were part of a pattern that made it highly unlikely that her death was accidental.

E. The Trial Court's Instruction To The Jury Did Not Violate The Due Process Clause

The court of appeals found that the trial court's instruction regarding the use that the jury could make of the medical evidence of prior injuries was improper and contributed to the due process violation that the court found in this case.[11] For the reasons we have discussed, the court's conclusion that the evidence was improperly introduced was flawed and the court's reliance on that supposed error in analyzing the instruction was equally flawed. In addition, the instruction must be considered in the context of the instructions and the trial record as a whole to determine whether fundamental fairness was violated. See, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 146-147 (1977). Viewed without the distortion of the court's erroneous assessment of the admissibility of the evidence in question, the instruction regarding its permissible uses did not deprive respondent of due process.

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[11] See Pet. App. A8-A9 ("[W]e find that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most prejudicial manner possible, rendered [respondent's] trial arbitrary and fundamentally unfair."); *id.* at A14 ("[T]he faulty instruction considered along with the admittance of the prejudicial evidence 'so infected the entire trial that the resulting conviction violate[d] due process.'"); *id.* at A15 ("[T]he prejudicial effect of the errors * * * amount[s] to a denial of due process.").

The challenged portion of the instruction advised the jury that, in addition to establishing battered child syndrome and impeaching Daisy McGuire's testimony that she had no reason to be afraid of respondent, the prior injury evidence could be used, if certain conditions were met, to support the inference that respondent had beaten Tori. In particular, the court told the jury that, if it found a sufficiently "clear connection" between the prior injuries and the injuries that resulted in Tori's death, the jury could conclude that if respondent "committed other offenses, he committed the crime charged in the case." Tr. 756-757; see note 1, *supra*. While the language of that instruction is not as clear as it might have been, the point of the instruction is apparent. The court was advising the jury, in effect, that if it found a "clear connection" between the prior injuries and the instant injuries, and if it found that respondent had committed the prior injuries, the jury could find that he also committed the injuries that led to Tori's death.

That instruction states, in a general way, the principle that underlies much "similar act" evidence: if there is some clear connection between one act and another, evidence that a person committed the first act may help prove that he committed the second. As applied to this case, moreover, that instruction could not have misled the jury.

Other than Daisy McGuire's testimony, given under a grant of transactional immunity and impeached by prior inconsistent statements, the evidence in this case indicated that it was respondent, and not his wife, who had mistreated Tori in the past. It was perfectly permissible for the jury to consider the circumstantial evidence of respondent's responsibility for the prior assaults as bearing on the likelihood

that it was respondent, and not his wife, who administered the blows that resulted in Tori's death.

Furthermore, the trial court guarded against possible misuse of the instruction by specifically advising the jury that the evidence "may not be considered * * * to prove that [respondent] is a person of bad character or that he has a disposition to commit crimes." Tr. 756-757. The instructions as a whole, moreover, repeatedly emphasized that the jury must find respondent guilty of the charged offense beyond a reasonable doubt. Tr. 751, 761, 762, 765. The court's instruction to the jury regarding the possible logical relationship between Tori's prior injuries and the injuries that led to her death was therefore not erroneous even under conventional principles of evidence law, and it was certainly not so unfair as to deprive respondent of due process.[12]

Finally, even an erroneous jury instruction rises to the level of a due process violation only if there is prejudice. *Cupp* v. *Naughten*, 414 U.S. at 147. Here, in view of the evidence of the extensive injuries im-

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[12] Indeed, although it is not necessary to reach the issue in this case, it is far from clear that a state law would violate the Due Process Clause if it permitted the use of "prior crimes" evidence to show propensity to commit a charged offense. As this Court has noted, "such facts might logically be persuasive that [a defendant] is by propensity a probable perpetrator of the crime." *Michelson* v. *United States*, 335 U.S. 469, 475 (1948). The law of character evidence acknowledges the force of that proposition. *Edgington* v. *United States*, 164 U.S. 361, 366 (1896). Such evidence is typically excluded not because it lacks relevance, but because of concern that the finder of fact may give it undue weight. It has never been established, however, that a State is constitutionally barred from deciding that the "admitted probative value" of such evidence, *Michelson*, 335 U.S. at 476, outweighs the possibilities of jury prejudice and confusion.

mediately prior to the death and the circumstantial evidence pointing to respondent (including the overheard hospital conversation, the evidence that respondent was alone with the baby shortly before the trip to the hospital, and respondent's extremely implausible attempts to explain the injuries), any claim of prejudice is especially weak.

In sum, neither the admission of the medical evidence of Tori McGuire's prior injuries nor the instruction given to the jury regarding the use of that evidence constituted a violation of respondent's right to due process. In deciding to invalidate the result of the state court proceeding, the court of appeals misapplied ordinary principles of relevance, misconceived its authority under the federal habeas corpus statute, and misinterpreted the role assigned to the Due Process Clause in reviewing ordinary evidentiary rulings made in state court proceedings.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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